

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

1-22-03 7083

IN THE MATTER OF:

MATRIX ENERGY, LLC)
FOR DETERMINATION OF)
RETAIL ELECTRIC SUPPLIER)

CASE NO. 2003-00228

**RESPONSE OF MATRIX ENERGY, LLC TO
MOTION TO DISMISS**

Comes Matrix Energy, LLC ("Matrix"), by counsel, and for its Response to Big Sandy Rural Electric Cooperative Corporation's ("Big Sandy") Motion to Dismiss, states as follows:

On June 16, 2003, Matrix filed its application requesting a determination of whether Kentucky Power d/b/a American Electric Power ("AEP") or Big Sandy should serve its new mine located in Johnson, Floyd and Martin counties. The new mine, called the Matrix Mine, will mine the Alma coal reserves. Approximately Seventy-five percent (75%) of the Alma coal reserves to be mined by Matrix are located in the certified territory of AEP and approximately twenty-five percent (25%) of the Alma coal reserves are located in the certified territory of Big Sandy. Big Sandy now moves to dismiss Matrix's application, arguing that 1) Matrix did not have standing to file its application with the Public Service Commission ("Commission") and 2) that Matrix could not file the application because it is not the real party in interest. For the reasons set forth below, both of Big Sandy's arguments are without merit.

A. MATRIX HAS STANDING TO FILE THE APPLICATION.

As stated in its Post Hearing Memorandum, on September 4, 2002, Matrix entered into a Mining Contract with Czar Coal Corporation ("Czar") to mine the Alma coal reserves located on the Czar mining site. The contract between Matrix and Czar is for a one year term and is to be automatically extended for successive periods of one year until the exhaustion of mineable and

merchantable coal. (Matrix's Answer to Big Sandy's Document Request at Tab 2). Under the contract, Matrix is responsible for, among other things, the construction, installation, inspection, and maintenance of all facilities, structures, roads, utilities, equipment and refuse used in the mining operation. (Matrix Answer to Big Sandy's Document Request at Tab 2, Article IV, Para. F). Matrix is also responsible under the contract for the employment and payment of its employees and providing them with benefits. Despite the above facts establishing that Matrix is the entity responsible for mining the Alma coal reserves located in the certified territories of AEP and Big Sandy and the utilities used in same, Big Sandy now argues that Matrix did not have standing to file its application pursuant to KRS Chapter 278.

Big Sandy claims that KRS Chapter 278 does not confer any rights to file an application upon a customer such as Matrix, as its purpose is only to encourage the orderly development of retail electric service and to minimize disputes between retail electric suppliers. (Memorandum Brief of Big Sandy at p. 8). Tellingly, Big Sandy fails to mention the other reasons set forth in KRS 278.016 for establishing the certified territories of the utilities operating in Kentucky, which are:

- to avoid wasteful duplication of distribution facilities;
- to avoid the unnecessary encumbering of the state's landscape;
- to prevent the waste of materials and natural resources;
- for the public convenience; and
- to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer.

When all of the reasons set forth in KRS 276.016 which justify the establishment of certified territories are considered, they clearly show the legislature's concern for consumers, and not just the concerns of the retail electric suppliers. Even the reasons that do not expressly mention consumers, such as the avoidance of waste and the wasteful duplication of distribution facilities, are to protect consumers from the higher prices that would result from such waste and duplication. Accordingly, the provisions of KRS Chapter 278, including KRS 278.016, do

confer rights to file an application such as that filed by Matrix where a new electric consuming facility is created in adjacent certified territories.

Big Sandy asserts that allowing Matrix to file its application to determine which utility should serve the Matrix mine is contrary to the purpose of encouraging the orderly development of retail electric service. However, allowing a consumer such as Matrix to file an application where it is a new electric consuming facility located in adjacent certified territories clearly supports this purpose. This process allows the Commission to decide which utility should serve the new facility following statutory guidelines instead of allowing the consumer or the utilities to make the decision based on factors that may or may not be appropriate. Again, Big Sandy's position is without merit.

The courts and the Commission itself have long interpreted the provisions of KRS Chapter 278 as authorizing a consumer's filing of an application for determination of service in the case of a new electric consuming facility located in adjacent certified territories. The case of Owen County Rural Electric Cooperative Corporation v. Public Service Commission of Kentucky, Ky. App., 689 S.W.2d 599 (1985), concerned the determination of whether Union Light, Heat and Power Company or Owen County RECC should provide electric service to an industrial park located in both utilities' certified territory. The Campbell County Fiscal Court initiated the case by filing an application for determination of service to its industrial park. The application of Campbell County Fiscal Court was certainly not dismissed for lack of standing by either the Commission or the courts even though neither utility filed the application.

Likewise in the Order to Satisfy or Answer, *Michael and Carol Conover v. Inter-County Rural Electric Cooperative and Kentucky Utilities Company* Case No. 90-232 (Ky. P.S.C. August 15, 1990), the customer was permitted to file the application pursuant to KRS 278.016 - KRS 278.018, and the application was not dismissed for lack of standing.

As reflected in the above cited decisions, it is clear that under the Commission's interpretation of KRS 278.016 - KRS 278.018, Matrix had standing to file its application. Furthermore, the Commission's longstanding interpretation of KRS 278.016 - and KRS 278.018 authorizing the filing of applications by customers locating a new electric consuming facility in adjacent certified territories must be adhered to, as the Kentucky courts have held that "interpretation of a statute made by an administrative agency, once made and applied over a long period of time, cannot be unilaterally revoked by the agency." GTE v. Revenue Cabinet, Commonwealth of Kentucky, Ky., 889 S.W. 2d 788, 792 (1994).

Finally, Big Sandy's challenge to Matrix' standing to file its application should also be denied because its challenge was not asserted until discovery in this case was completed and the hearing actually held. As stated in the Response of AEP to Big Sandy's Motion to Dismiss, under the civil rules of procedure, "lack of capacity is an affirmative defense that is waived unless raised early in the proceedings." Citing F.D.I.C. v. Calhoun, 34 F. 3d 1291, 1299 (11th Cir. 1994).

B. MATRIX IS THE REAL PARTY IN INTEREST.

Big Sandy argues in its Motion to Dismiss that Matrix is not the real party in interest in this case and that it is merely a shell corporation with no assets, no coal, no electrical infrastructure and will not be responsible for the payment of its electric bill. In making this argument, Big Sandy ignores all of the evidence in the record establishing that Matrix is not a shell company, but is an economically viable company that is expected to exist for at least ten (10) years. The evidence in the record reflects that Matrix has entered into a Mining Contract with Czar to mine approximately 16.6 million tons of coal from the Alma coal reserves on the Czar mining site, and that it will take Matrix over ten (10) years to mine this coal. (See Matrix Answer to AEP's Data Request No. 2). Certainly, the right to mine this substantial amount of

coal is a valuable asset.

As reflected in the Mining Contract executed by Matrix, it is responsible for, among other things, the construction, installation, inspection, and maintenance of all facilities, structures, roads, utilities, equipment and refuse used in the mining operation, which includes the four continuous miners, shuttle cars, roof bolters, feeders, belt drive, and a scoop used in the mining operation. (Matrix Answer to Big Sandy's Document Request at Tab 2, P. Horn testimony at Para 20 & Transcript at p. 16). Matrix started building the entrance to the mine in November 2002. (P. Horn testimony, Para. 16).

As also reflected in the record, Matrix will pay for the electricity used in the Matrix mine and will also will benefit from the over \$1,500,000.00 in cost savings to be recognized should AEP be allowed to provide power to the mine. (P. Horn testimony, Para. 21). The record also reflects that Matrix is the entity that obtained the electric power used to operate the equipment necessary to build the entrance to the mine and the ventilation shaft. (P. Horn testimony, Para. 17 & 21). Under the Mining Contract, Matrix will receive as payment, the sum of its normal costs of mining, plus a royalty for each ton of coal mined. (Matrix Answer to Big Sandy's Document Request at Tab 2, Article III, & Transcript, p. 31). These facts establish that Matrix is more than a "shell", and will be responsible for the payment of the electric power provided to the mine. Indeed, the evidence in the record establishes that Matrix will be required to pay the \$332,000.00 cost of a new tap onto AEP's 69 kV line if that is the option required by the Commission. (P. Horn testimony, p. 45).

Big Sandy also claims that Matrix has abandoned its duplication of facilities theory and now embraces the existing facilities theory, presumably because Matrix proposes the option of obtaining electricity through the Pevler substation on AEP's 69 kV line. (Big Sandy's Memorandum Brief at p. 10). In fact, allowing Matrix to obtain power through the Pevler

substation would undoubtedly avoid the waste and duplication of facilities mentioned in KRS 278.016, which weighs in favor of granting its application for service from AEP.

Big Sandy seems to argue that the Commission should not allow Matrix to obtain power through the Pevler substation owned by Czar, since there is no evidence that Czar would consent to such an arrangement. (Big Sandy's Memorandum Brief at p. 10). In making this argument, Big Sandy ignores the evidence in the record that Beech Fork Processing, Inc. ("Beech Fork"), Matrix and Czar are affiliated companies that are owned by the same individuals. (P. Horn testimony, Para. 5). It also ignores the evidence that Paul Horn is employed by Beech Fork, as the Manager of Engineering, and his duties include:

[T]he review and identification of coal reserves and the permitting of the coal reserves. . . . overseeing the operation of the mine, including the manner in which power is supplied to the mine site. . . . planning of how the mining is to be performed, obtaining the proper permits and ensuring the payment of royalties.

(P. Horn testimony, Para. 3). Mr. Horn "performs these duties for Beech Fork and for its affiliated companies" including Matrix and Czar. (P. Horn testimony, Para. 3). It is clear that Czar would consent to the service of the Matrix mine through the Pevler substation based on the fact that it is owned by the same individuals that own Czar. Czar's ongoing consent to Matrix obtaining power through the Pevler substation and Czar's ongoing consent to provide power to the Taurus # 9 mine confirms this fact. (Transcript, p. 37). If Matrix obtains its power through the Pevler substation owned by Czar, it will pay its portion of the power bill to Czar. (Transcript, p. 32 & Answer to Commission Data Request made at the Hearing). Finally, as indicated in AEP's supplement to its Answer to the Hearing Data Request No. 4, AEP can serve the Matrix mine from the Pevler substation.

Based on the above facts, it is clear that Matrix is the real party in interest and properly filed the application with the Commission. It is the entity responsible for operating the Matrix mine and mining approximately 16.6 million tons of coal from the Alma coal reserves. Matrix

must have electric power to operate the electric equipment in the mine. It will be the entity responsible for the payment of the electric power provided to the Matrix mine, and will be required to reimburse Czar for the cost of power provided through the Pevler substation. It will also be the entity that benefits from the cost savings recognized by service of the mine by AEP. Indeed, the less Matrix is required to pay for power to the mine, the greater its profit margin.

Big Sandy's argument that Matrix is not the real party in interest is simply without merit, and this argument does not justify the granting of the Motion to Dismiss.

CONCLUSION

For the above stated reasons, the Motion to Dismiss filed by Big Sandy should be denied, as Matrix had standing to file its application with the Commission and it is the real party in interest.

Respectfully submitted,



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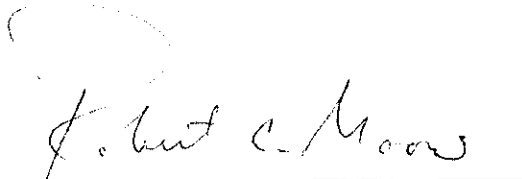
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served by United States First Class Mail, postage prepaid, on this 13th day of October, 2003 upon:

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